

Supreme Court, U. S.

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In The
Supreme Court of the
United States

October Term, 1978

No. 79-525

JEANENE MOENCKMEIER,

Petitioner,

v.

UNITED STATES OF AMERICA and
NELSON H. PATNAUDE, Special
Agent, Internal Revenue Service

and

MIDLANTIC NATIONAL BANK
and BRIAN WAIVER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JEANENE MOENCKMEIER
Petitioner Pro Se
1545 Ninth Avenue
San Diego, Cal. 92101
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<u>INDEX</u>	Page
Table of Authorities	iii
Petition for Writ of Certiorari . .	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Primary Constitutional Provisions & Statutes Involved	4
Statement of the Case	5
Reasons for Granting the Writ . . .	9
<p>I. IT IS INCONSISTENT WITH THE PURPOSE OF 26 U.S.C. § 7609 AND IT IS A DENIAL OF DUE PROCESS TO DENY A TAXPAYER AN EVIDENTIARY HEARING AND DISCOVERY, AFTER HE HAS PUT IN ISSUE ALLEGATIONS OF THE COMPLAINT AND RAISED PROPER AFFIRMATIVE DEFENSES 9</p>	
<p>II. THE DECISIONS OF THE THIRD CIRCUIT ARE IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS AS TO THE BURDEN WHICH MUST BE MET BY A TAXPAYER, WHO INTERVENES AT AN ENFORCEMENT PROCEEDING, BEFORE HE IS ENTITLED TO AN EVIDENTIARY HEARING AND DISCOVERY PRIOR TO THE ENFORCEMENT OF AN IRS SUMMONS 17</p>	
<p>III. THE DECISION OF THE THIRD CIRCUIT TO AFFIRM THE DISTRICT COURT IS INCONSISTENT WITH THE DECISION OF THE SUPREME COURT IN <u>U.S. V. LASALLE</u>. <u>LASALLE</u> EXPANDS THE NEED FOR EVIDEN- TIARY HEARINGS AND DISCOVERY BY ADDING TO THE <u>POWELL</u> TEST OF GOOD FAITH THE REQUIREMENT OF "INSTITUTIONAL GOOD FAITH."</p>	

Conclusion	27
Certificate of Service	27
Appendix	A-1
Judgment Order of July 17, 1979	A-1
Sur Petition for Rehearing August 23, 1979	A-3
Order of April 11, 1979	A-4
Order re: Stay pending Appeal, April 18, 1979	A-6
Affidavit of Nelson H. Patnaude of Dec. 19, 1978	A-8
Affidavit of Nelson H. Patnaude of March 15, 1979	A-11
Affidavit of Nelson H. Patnaude of April 10, 1979	A-13
Statutes Relied Upon (full text)	A-15

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
Allstate Mortgage Corp. of Florida v. Strasser, 277 So.2d 843 (Fla. 1973)	10
City of Rushville v. Rushville Natural Gas, 28 N.E. 853 (Ind. 1891)	10
Donaldson v. U.S., 400 U.S. 517 (1971)	13,14
Laing v. U.S., 423 U.S. 161 (1976).	10
Pennsylvania v. U.S., 236 U.S. 351 (1915)	10
Santa Clara County v. Hall, 100 Cal. Rptr. 629 (1972)	10
State of Zornes, 475 P.2d 107 (Wash. 1970)	10
U.S. v. Church of Scientology of California, 520 F.2d 818 (9th Cir. 1975)	17,21
U.S. v. Garrett, 571 F.2d 1323 (5th Cir. 1978)	17,21
U.S. v. Genser (Genser I), 582 F.2d 292 (3d Cir. 1978)	13,20
U.S. v. Genser (Genser II), 595 F.2d 146 (3d Cir. 1979)	20
U.S. v. Kirby, 74 U.S. 482 (1896)	11
U.S. v. LaSalle National Bank, 437 U.S. 298 (1978)	9,23,24,26
U.S. v. McCarthy, 514 F.2d 368 (3d Cir. 1975)	17,20
U.S. v. Powell, 379 U.S. 59 (1964)	23,24
U.S. v. Salter, 432 F.2d 697 (1st Cir. 1970)	17,18,19,21,26
U.S. v. Turner, 480 F.2d 272 (7th Cir. 1973)	17
U.S. v. Wright Motor Co., Inc. 536 F.2d 1090 (5th Cir. 1976)	17,21

Constitution of U.S.

Amendment V 4,9,10,16

Statutes

26 U.S.C. §7602 4
26 U.S.C. §7604 4,6,11,12
26 U.S.C. §7609 . . . 9,10,11,12,13,14,15,22

Federal Rules

Federal Rules of Civil Procedure 52(a). 7

Legislative History

"Tax Reform Act of 1976, P.L. 94-455,"
H.R.REP. NO. 94-648, 94th Cong., 2d
Sess., reprinted in [1976] U.S.
CODE CONG. & AD. NEWS 2897. . . 11,12,14

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PETITION FOR WRIT OF CERTIORARI TO
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The petitioner JEANENE MOENCKMEIER respectfully prays that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit rendered on July 17, 1979 affirming the Order of the United States District Court for the District of New Jersey to enforce an administrative Internal Revenue Service summons and to deny petitioner an evidentiary hearing and discovery prior to enforcement of said summons.

OPINIONS BELOW

Third Circuit. There was no formal opinion rendered by the U.S. Court of Appeals for the Third Circuit. The judgment entered on July 17, 1979 affirming the order of the U.S. District Court for the District of New Jersey in Civil Action No. 79-158 is set forth in the appendix at A-1. Also set forth in the appendix at A-3 is the denial of the petition for rehearing entered August 23, 1979.

District Court. There was no formal opinion in the district court below. The district court orally denied petitioner's motions for an evidentiary hearing and discovery from the bench on April 9, 1979. The final judgment entered on April 11, 1979 compelling enforcement of the administrative I.R.S. summons and denying a stay pending appeal is set forth in the appendix at A-4. No findings of fact and conclusions of law were issued by the district court.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Third Circuit was entered on July 17, 1979. A timely petition for rehearing was denied on August 23, 1979. The judgment and denial of petition for rehearing are set forth in the appendix at A-1 and A-3 respectively. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. IS THE TAXPAYER, WHO INTERVENES, PURSUANT TO 26 U.S.C. §7609, AT AN ENFORCEMENT PROCEEDING TO JUDICIALLY ENFORCE AN I.R.S. SUMMONS, ENTITLED, UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, TO A MEANINGFUL HEARING TO CHALLENGE THE VALIDITY OF THE SUMMONS?

Petitioner says: Yes.

II. DOES 26 U.S.C. §7609 AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, REQUIRE THAT A TAXPAYER, WHO INTERVENES PURSUANT TO 26 U.S.C. §7609 AND WHO PUTS IN ISSUE ALLEGATIONS OF THE COMPLAINT AND RAISES PROPER AFFIRMATIVE DEFENSES, BE GIVEN AN EVIDENTIARY HEARING AND DISCOVERY?

Petitioner says: Yes.

III. DOES LASALLE EXPAND THE NEED FOR EVIDENTIARY HEARINGS AND DISCOVERY BY ADDING TO THE POWELL TEST OF GOOD FAITH THE REQUIREMENT OF "INSTITUTIONAL GOOD FAITH?"

Petitioner says: Yes.

PRIMARY CONSTITUTIONAL PROVISIONS
& STATUTES INVOLVED

Constitution of the United States,
Amendment V:

No person shall. . . . nor shall
be deprived of life, liberty, or
property, without due process of
law;.

Title 26, United States Code, Section 7602:

Examination of books and witnesses

For the purpose of ascertaining the
correctness of any return, making a
return where none has been made,
determining the liability of any
person for any internal revenue
tax or the liability at law or
in equity of any transferee or
fiduciary of any person in respect
of any internal revenue tax, or
collecting any such liability, the
Secretary is authorized--.....
* * * * *

Title 26, United States Code, Section 7609
(b) (1)

Notwithstanding any other law or rule
of law, any person who is entitled
to notice of a summons under subsection
(a) shall have the right to intervene
in any proceeding with respect to
the enforcement of such summons
under section 7604.

Title 26, United States Code, Section 7609(e)

Suspension of Statute of Limitations

If any person takes any action as
provided in subsection (b) and such
person is a person with respect to
whose liability the summons is
issued (or is the agent, nominee,
or other person acting under the
direction or control of such person),
then the running of any period of
limitations under section 6501
(relating to the assessment and
collection of tax) or under section
6531 (relating to criminal prosecution)
with respect to such person shall
be suspended for the period during
which a proceeding, and appeals
therein, with respect to the
enforcement of such summons is pending.

Title 26, United States Code, Section 7609
(h) (2)

.....a proceeding under this section, and
appeals, take precedence on the
docket over all cases and shall be
assigned for hearing and decided
at the earliest practicable date.

STATEMENT OF THE CASE

On June 21, 1978 the Internal Revenue Service served an administrative summons upon respondent Midlantic National Bank of West Orange, N.J. for the bank records of Jeanene Moenckmeier. Pursuant to 26 U.S.C. §7609 Jeanene Moenckmeier requested the bank not to comply with the summons. On January 12, 1979 the United States of America and Nelson H. Patnaude, Special Agent of the IRS filed an action under 26 U.S.C. §7604 to compel compliance with the summons. (R. 8-16)^{1/} Intervenor-petitioner Jeanene Moenckmeier filed a pleading in intervention (R. 19-39) together with supporting affidavits, specifically alleging that the IRS administrative summons was issued in bad faith because

(1) the IRS summons was being used to gather information for a grand jury investigation of the taxpayer-intervenor for alleged customs' violations related to the importation of amygdalin ("laetrile") in the Eastern District of New York;

(2) the bank records sought by the IRS summons were already in the possession of the government;

(3) the IRS has made an institutional commitment to make a referral to the Justice Department but has delayed "merely ... to gather additional evidence for prosecution;"

(4) the IRS has used unlawful (or lawful) electronic surveillance prior to issuing the summons.

^{1/} "R" references are to the separately bound record appendix submitted in Third Circuit.

Intervenor-petitioner made a timely motion for an evidentiary hearing and discovery. (R. 42)

At the Show Cause hearing on April 9, 1979 Jeanene Moenckmeier renewed her request for an evidentiary hearing and discovery. After a brief oral argument by Counsel with no cross-examination permitted, District Judge H. Curtis Meanor ordered that the IRS summons be enforced (R. 5; A-4) ^{2/}, denied Jeanene Moenckmeier's motion for an evidentiary hearing and discovery and ordered the government to submit a post-hearing affidavit (R. 18; A-13) covering the allegations which intervenor-petitioner had put in issue, instead of granting an evidentiary hearing and discovery. The post-hearing affidavit was an improper substitute for an evidentiary hearing and discovery, where the taxpayer had put in issue allegations of the complaint and raised proper affirmative defenses. By ordering a post-hearing affidavit, the District Judge acknowledged that intervenor-petitioner had put in issue allegations of the complaint.

Mr. Patnaude, the agent who had issued the summons herein, was not present at the hearing and could not be cross-examined. Judge Meanor did not make the requisite findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure.

Intervenor-petitioner requested a stay pending appeal from the district court. Her motion was denied. (R.5,A-5) After making a timely appeal to the U.S. Court of Appeals for the Third Circuit (R. 4),

^{2/} "A- " references are to the appendix attached to the petition hereto.

intervenor-petitioner then made a motion to the Third Circuit for a stay pending appeal which that Court granted (A-6). The Third Circuit ordered an expedited appeal (A-6). Oral argument in the Third Circuit was held on July 12, 1979 at which time petitioner Jeanene Moenckmeier requested that Court to vacate the order of the district court and to remand the case for an evidentiary hearing and discovery.

On July 17, 1979, the U.S. Court of Appeals for the Third Circuit affirmed the judgment of the district court which ordered the enforcement of the IRS summons herein and denied Jeanene Moenckmeier's motion for an evidentiary hearing and discovery (A-4). A timely petition for rehearing was denied on August 23, 1979 (A-3). Petitioner's motion for a stay of the mandate until September 29, 1979 and then until final disposition of the petition for writ of certiorari, provided a petition for writ of certiorari is filed in the Supreme Court by September 29, 1979, was granted by the Third Circuit on August 30, 1979.

REASONS FOR GRANTING THE WRIT

I. IT IS INCONSISTENT WITH THE PURPOSE OF 26 U.S.C. § 7609 AND IT IS A DENIAL OF DUE PROCESS TO DENY A TAXPAYER AN EVIDENTIARY HEARING AND DISCOVERY, AFTER HE HAS PUT IN ISSUE ALLEGATIONS OF THE COMPLAINT AND RAISED PROPER AFFIRMATIVE DEFENSES.

The taxpayer who intervenes pursuant to 26 U.S.C. § 7609 at an enforcement proceeding is entitled to a meaningful hearing.

The Third Circuit and the Internal Revenue Service in the proceedings below have expressed their concern that if the intervenor-taxpayer herein is granted an evidentiary hearing and discovery it will result in an endless number of requests for evidentiary hearings and discovery by other taxpayers at enforcement proceedings in the future; thereby causing delays and the frustration of the fair administration of the tax laws. However, the Supreme Court in U.S. v. LaSalle National Bank, 437 U.S. 298 (1978) expanded the need for evidentiary hearings and discovery, in spite of the same objection by the dissent in LaSalle, supra, that the holding of the majority would produce more discovery proceedings. (Please see Reason III for Granting the Writ, infra at p. 23).

If granting the taxpayer a meaningful hearing results in delays and a frustration of the administrative processes of the Internal Revenue Service,

the solution is not to deny the taxpayer his Fifth Amendment due process guarantees, but to look to Congress to change the statutes governing this area.

When Congress enacted 26 U.S.C. §7609^{3/} providing for the intervention of a taxpayer at an enforcement proceeding, Congress intended that the hearing at which the intervenor-taxpayer challenges the enforcement of the Service's third party summonses have a purpose and that such a hearing be meaningful. The Supreme Court of the United States held in Pennsylvania v. U.S., 236 U.S. 351, 356 (1915) that Congress intends to do what it does. Legislatures are presumed to know the meaning of the words they choose. Allstate Mortgage Corporation of Florida v. Strasser, 277 So.2d 842 (Fla. 1973); Santa Clara County v. Hall, 100 Cal.Rptr. 629 (1972); State v. Zornes, 475 P.2d 107 (Wash. 1970); City of Rushville v. Rushville Natural Gas, 28 N.E. 853, 855 (Ind. 1891).

In Laing v. U.S., 423 U.S. 161, 183 (1976), the Supreme Court of the United States based its limitations of the I.R.S. jeopardy assessment and its requirement that hearing procedures be used, on the "Legislative Scheme" which favored hearing procedures. Intervenor-petitioner Jeanene Moenckemier asserts that the legislative scheme set forth in 26 U.S.C. §7609 provides the opportunity to challenge the propriety, legality and constitutionality of an I.R.S. summons at a meaningful hearing which would include an evidentiary hearing and discovery.

^{3/} Please see Appendix at A-15 for text of Statutes Relied Upon.

This challenge should be meaningful and not merely a charade to let the taxpayer think the government is providing a hearing. Congress intended that this §7604-7609 hearing have as a purpose something more than the Internal Revenue Service's "writ of assistance." Congress enacted 26 U.S.C. §7609, giving the taxpayer a statutory right to intervene at an enforcement proceeding, in order to give the taxpayer a forum to protect his civil rights and right to privacy from unreasonable infringements by the use of IRS administrative summonses. Please see Legislative History to the "Tax Reform Act of 1976," House Report No. 94-658, 94th Cong., 2d Sess. p. 307, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3203 for intent of Congress regarding §7609.

A hearing which does not afford the opportunity for a meaningful challenge of an Internal Revenue Service summons was not the purpose of Congress when it enacted Section 7609. A statute must be construed so as to avoid an absurd conclusion. U.S. v. Kirby, 74 U.S. 482, 486-487 (1896).

Congress anticipated that the enactment of 26 U.S.C. §7609 would cause delays and therefore included provisions in that section to safeguard against those delays and any detrimental consequences from those delays. In §7609(e) the statute of limitations for the assessment and collection of taxes and for criminal prosecution is tolled during the pendency of the proceedings and appeals under 26 U.S.C. §7609. §7609(h)(2) also provides that proceedings under 26 U.S.C. §7609 shall take precedence over all other cases. The legislative history of the

Tax Reform Act of 1976, P.L. 94-455 also indicates that these provisions were intended to protect against any delays caused by a taxpayer's intervention. "Tax Reform Act of 1976," P.L. 94-455, H.R.REP. NO. 94-658, Ibid. at 309-310, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2897, 3205-3206.

These safeguards protect against delays, but also act as penalties to the taxpayer who decides to challenge an I.R.S. summons at the investigatory stage rather than at the trial level. It does not follow that the taxpayer should be denied a fair hearing in addition to the above penalties when he chooses to challenge an I.R.S. summons as an intervenor at the investigatory stage pursuant to 26 U.S.C. §7609, rather than at the trial level.

If Congress had intended further safeguards against delays, such as limiting the hearing to a summary proceeding or limiting the application of the Federal Rules of Civil Procedure, it would have included those safeguards in the statute. 26 U.S.C. §7609 is very explicit as to the application and procedure to be followed. Additionally, the words used in §7609(b)(1) regarding intervention indicate that Congress intended that the rights provided by this statute would supersede any rule of law to the contrary:

Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604

When Congress stated in the statute the words "notwithstanding any other law or rule of law" it probably was referring to Donaldson v. U.S., 400 U.S. 517 (1971) which limited a taxpayer's right to intervene in an enforcement proceeding and which limited the application of the Federal Rules of Civil Procedure in that enforcement proceeding, making the hearing summary in nature and limiting discovery.

When the Supreme Court of the United States in Donaldson supra endorsed summary proceedings, it did not anticipate 26 U.S.C. §7609 wherein the taxpayer was given a statutory right to intervene. It would naturally follow that the Donaldson rule no longer applies to enforcement proceedings wherein the taxpayer intervenes. It also would follow that since the taxpayer now has a right to intervene in an enforcement proceeding, he also has a right to a meaningful hearing.

In Donaldson, supra, the Supreme Court could justify endorsing summary proceedings for the enforcement of an I.R.S. summons because the taxpayer had an opportunity to fully challenge a summons at trial, as the Third Circuit reasoned in U.S. v. Genser (Genser I), 582 F.2d 292 (3d Cir. 1978) at 303:

Thus, the Donaldson Court, in its effort to facilitate the investigatory mandate of the IRS merely postponed until trial the time at which a taxpayer can demand adjudication of the propriety of a third party summons.¹⁸

¹⁸Several courts have perceived that the Donaldson Court's recognition that the taxpayer can

raise his claim of abuse of process at trial was a significant factor in its decision to limit his opportunity to raise those claims during the investigatory stage (citations omitted).

The rationale in Donaldson for limiting the challenge at the investigatory stage no longer is applicable to an enforcement proceeding wherein the taxpayer intervenes by right pursuant to 26 U.S.C. §7609. If the taxpayer challenges the summons at the investigatory stage and the summons is nevertheless enforced, his opportunity to challenge the summons at trial no longer exists. To deny the taxpayer the right to challenge the validity of an IRS administrative summons at trial without first giving the taxpayer an opportunity to fully challenge the summons at an enforcement proceeding with the same due process guarantees he would have at trial would be a denial of due process.

The legislative history to the Tax Reform Act of 1976, P.L. 94-455 (enacting 26 U.S.C. §7609) in H.R. Rep. No. 94-658 at 308, *Ibid.* 3204, states that:

. . . where the noticee does not request the third-party witness not to comply at this stage, he would still be permitted to assert such defenses as may be available to him with respect to any evidence obtained pursuant to the summons in any later court action in which the noticee was directly involved (i.e., affecting his tax liability or any criminal charges which might be brought)

the same extent as may be permitted under present law.

If Congress found it necessary to point out that the taxpayer would still be permitted to challenge the legality of an IRS summons at a subsequent trial, if he did not exercise his statutory right under §7609 at the investigatory stage, then conversely it would logically follow that Congress intended that the taxpayer would not be permitted to make that challenge at the trial level if he made it at the investigatory stage pursuant to §7609.

The Internal Revenue Service also contends that the taxpayer's intervention at an enforcement proceeding to challenge an IRS summons precludes the later challenge of the same summons in a motion to suppress at a subsequent trial, wherein the fruits of the summons are introduced into evidence. If the above contention of the IRS is true, then the initial hearing must be a fair hearing with all of the due process guarantees which are essential to safeguard accuracy and completeness of evidence: opportunity to be heard, cross-examination of witnesses and discovery. Only then can the taxpayer's intervention at the investigatory stage be an adequate substitute for a motion to suppress at the trial level.

Congress could not have intended to give the taxpayer a statutory right to intervene in 26 U.S.C. §7609 whereby, if the taxpayer exercised that right, he would forever be precluded from receiving a fair hearing with all the guarantees of due process at any hearing, including the

one which he would have received had he chosen to raise his challenge of the IRS summons for the first time at trial.

Where the taxpayer, pursuant to statutory right, challenges the purpose of the IRS in issuing the summons, the taxpayer is entitled to a meaningful hearing to make that challenge under the due process clause of the Fifth Amendment to the U.S. Constitution.

Intervenor-Petitioner has not received a fair hearing in the district court. Petitioner was denied an evidentiary hearing, denied discovery and denied the opportunity to confront her opponents. Mr. Nelson H. Patnaude, the Special Agent who initiated the enforcement proceeding and submitted affidavits in support thereof, was not even present at the hearing. In fact, when District Court Judge Meanor expressed a desire to ask questions of Mr. Patnaude regarding the investigation, he was unable to do so because of Mr. Patnaude's absence. Intervenor-petitioner put in issue allegations of the complaint and raised proper affirmative defenses and therefore should have been granted an evidentiary hearing and discovery. Instead, Judge Meanor ordered a post hearing affidavit, concerning the issues raised, to be submitted as a substitute for an evidentiary hearing and discovery. (A-13, infra)

Petitioner admits that the taxpayer has a heavy burden to meet to prove that the IRS summons was not issued in good faith; however, there is a different burden to be met by the taxpayer for the taxpayer to be entitled to an evidentiary

hearing. To be entitled to an evidentiary hearing the taxpayer must put in issue allegations of the complaint and raise proper affirmative defenses which petitioner has done. U.S. v. McCarthy, 514 F.2d 368 (3d Cir. 1975).

II. THE DECISIONS OF THE THIRD CIRCUIT ARE IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS AS TO THE BURDEN WHICH MUST BE MET BY THE TAXPAYER BEFORE A TAXPAYER, WHO INTERVENES IN AN ENFORCEMENT PROCEEDING, IS ENTITLED TO AN EVIDENTIARY HEARING AND DISCOVERY PRIOR TO THE ENFORCEMENT OF AN IRS SUMMONS.

The First, Fifth, Seventh and Ninth Circuits have established similar procedures for proceedings to judicially enforce IRS administrative summonses where the taxpayer challenges the purpose and good faith of the IRS in issuing the IRS administrative summons.

The Fifth, Seventh and Ninth Circuits have followed the procedure and rationale set forth by the First Circuit in U.S. v. Salter, 432 F.2d 697 (1970). Please see the following cases for the specific procedures of the Courts of Appeal for the Fifth, Seventh and Ninth Circuits. U.S. v. Garrett, 571 F.2d 1323 (5th Cir. 1978); U.S. v. Wright Motor Co., Inc., 536 F.2d 1090 (5th Cir. 1976); U.S. v. Turner, 480 F.2d 272 (7th Cir. 1973); U.S. v. Church of Scientology of California, 520 F.2d 818 (9th Cir. 1975).

The First Circuit in U.S. v. Salter, supra held that the taxpayer would not be permitted discovery unless he could produce "some evidence supporting respondent's allegations." Ibid at 700. Although conclusory allegations of improper purpose were held to be insufficient to permit discovery by the taxpayer, they were held to be sufficient to permit a limited evidentiary hearing to cross-examine the IRS agent who issued the summons. The cross-examination would be limited to the purpose of the summons and investigation.

In order to allow the taxpayer some opportunity to substantiate his allegations of improper purpose and bad faith, the court in U.S. v. Salter, supra found it necessary to permit the taxpayer, who raises improper purpose in his answer, at the minimum, a limited evidentiary hearing to cross-examine the IRS agent, who issued the summons, on the purpose of the summons and investigation.

In establishing the procedure in Salter, supra, the court approved the suggestion offered by the government. The general solution to the taxpayer's need for discovery in summons enforcement cases would be for the

district court to proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons, concerning his purpose. The court could then, by observation and, where necessary, its own questioning of the agent, make its own determination of whether

exploration, as by discovery, seemed to be in order. Ibid. at 700.

The Court in Salter then went on to give the test for permitting discovery:

If at the end of the hearing there remains a substantial question in the court's mind regarding the validity of the government's purpose, it may then grant discovery.

Salter found a double purpose in requiring at least a limited evidentiary hearing where the taxpayer asserts improper purpose or bad faith: 1) to permit the taxpayer at least some opportunity to prove his allegations; and 2) to "eliminate discovery in cases which it is clear that the respondent will not be able to prove his allegations." Ibid. at 701.

In summary, the tests for permitting an evidentiary hearing and discovery in the circuits which follow U.S. v. Salter, supra (First, Fifth, Seventh and Ninth) are as follows:

1) the test for permitting an evidentiary hearing is whether the taxpayer or summonee has alleged improper purpose or bad faith in his answer to the complaint for enforcement of the summons.

2) the test for permitting discovery is whether, after a limited evidentiary hearing, permitting cross-examination of the IRS agent issuing the summons, "there remains a substantial question

in the court's mind regarding the validity of the government's purpose" Ibid at 700.

Although the Third Circuit, at first glance, appears to follow the same procedure for enforcement proceedings as above, the burden on the taxpayer in the Third Circuit is much heavier.

U.S. v. McCarthy, supra at 372-373 sets forth the procedure in the Third Circuit for enforcement proceedings.

Although the court in U.S. v. McCarthy, supra at 373 states that an evidentiary hearing is an "integral part of the proceedings" the test for permitting an evidentiary hearing is whether the taxpayer "puts in issue allegations of the complaint" and/or "raises proper affirmative defenses." Ibid.

The burden which must be met by the taxpayer in the Third Circuit for an evidentiary hearing is similar to the heavier burden in the other circuits which must be met before discovery is permitted. This heavier burden has the effect of precluding the taxpayer from even a limited opportunity of substantiating his allegations of improper purpose at an evidentiary hearing.

Elaborate procedures for permitting discovery after an evidentiary hearing which has raised issues which cannot be resolved by the record, are set forth in U.S. v. Genser (Genser I), 582 F.2d 292 (3d Cir. 1978) and U.S. v. Genser (Genser II), 595 F.2d 146 (3d Cir. 1979).

Petitioner-intervenor Jeanene Moenckmeier submits that she has met the heavier burden in the Third Circuit for an evidentiary hearing by putting in issue allegations of the complaint and raising affirmative defenses. The district judge acknowledged, in effect, that petitioner put in issue allegations of the complaint by ordering a post-hearing affidavit on the issue of whether the IRS was using its investigation as a subterfuge for a criminal grand jury investigation of petitioner in the Eastern District of New York. Judge Meanor could not resolve the issue on the record before him and cross-examination of witnesses was not permitted, nor was it even possible to cross-examine the IRS agent who issued the summons because he was not even present at the enforcement proceeding.

Petitioner submits, in the alternative, that even if the court finds that she did not meet the burden for an evidentiary hearing in the Third Circuit, she has met the burden in the other circuits, which requires only allegations of improper purpose or bad faith in her answer. Therefore, the case should be remanded to the district court for an evidentiary hearing and if that evidentiary hearing raises evidence of improper purpose or bad faith on the part of the IRS, she should be permitted discovery.

Failure to permit the taxpayer, who asserts improper purpose or bad faith in his answer, at least a limited evidentiary hearing with the opportunity to cross-examine the IRS agent issuing the summons has necessitated a reversal in circuits other than the Third Circuit: U.S. v. Salter, supra (1st Cir.); U.S. v. Church

of Scientology, supra (9th Cir.) and U.S. v. Wright Motor Co. Inc., supra (5th Cir.). In U.S. v. Garrett, supra at 1327, the Fifth Circuit stated that if the district court had not permitted at least cross-examination of the IRS agents, it would have necessitated a reversal.

Failure of the district court in the instant case to permit even a limited evidentiary hearing to cross-examine Mr. Patnaude, the IRS agent issuing the summons in the instant case, should also necessitate a reversal in this case.

In the interest of maintaining uniformity of decisions in the U. S. Courts of Appeals, the Supreme Court should exercise its supervisory power to determine the proper test which the taxpayer-intervenor must meet to entitle him to an evidentiary hearing and discovery, when he intervenes at an enforcement proceeding pursuant to 26 U.S.C. § 7609. Petitioner submits that this Court should adopt the test of the First, Fifth, Seventh and Ninth circuits.

III. THE DECISION OF THE THIRD CIRCUIT TO AFFIRM THE DISTRICT COURT IS INCONSISTENT WITH THE DECISION OF THE SUPREME COURT IN U.S. V. LASALLE. LASALLE EXPANDS THE NEED FOR EVIDENTIARY HEARINGS AND DISCOVERY BY ADDING TO THE POWELL TEST OF GOOD FAITH THE REQUIREMENT OF "INSTITUTIONAL GOOD FAITH."

To deny the taxpayer in the instant case an evidentiary hearing and discovery, when the taxpayer put in issue allegations of the complaint and raised proper affirmative defenses, is inconsistent with the decision of this Court in U.S. v. LaSalle National Bank, supra which necessitates more discovery on the part of the taxpayer, not less.

In LaSalle, supra the Supreme Court added a new good faith requirement of "institutional good faith" to the Powell test of good faith ^{4/} which must be met by the IRS in order to establish a prima facia case for enforcement. In LaSalle, supra the Supreme Court held that it is the "institutional posture" of the IRS

^{4/} U.S. v. Powell, 379 U.S. 59 (1964) at 255 outlines the so-called Powell test: "He [the Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed--"

which is dispositive of the good faith of the IRS, rather than the subjective intent of the individual IRS special agent.

LaSalle, supra at 315-316. The addition of this new good faith requirement to the Powell test of good faith requires that the IRS must now plead "institutional good faith" in order to make a prima facia case.

LaSalle, supra at 317, described the following situations as ones in which "institutional good faith" of the Internal Revenue Service would be lacking:

1. "... delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation and would permit the Government to expand its criminal discovery rights."

2. "Similarly, the good-faith standard will not permit the IRS to become an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases."¹⁹ (footnote omitted)

In addition to other allegations and defenses, in intervenor-petitioner's pleading, intervenor-petitioner in the case herein alleged "institutional bad faith" in her Pleading in Intervention

(R.21 ¶18), supported by affidavits. (Pleading, R. 19-26; Also Transcript at R. 81,82,83,87,101).

The Internal Revenue Service did not plead "institutional good faith" in their complaint, nor did the affidavits submitted by Special Agent Nelson H. Patnaude adequately deny the "institutional bad faith" alleged by intervenor-appellant:

1. " No recommendation for prosecution of the taxpayer for the years and tax returns under investigation has been made to the United States Department of Justice." (R. 12, ¶6; Also A-9 , infra)
2. "I have not made a recommendation for criminal prosecution in this case." (R.17, ¶3; A- 11, infra)
3. " The subject summons was not issued at the request of anyone from the Office of the United States Attorney." (R.17, ¶4; A-11, infra)
4. "I have not delayed any recommendation at the request of my superiors solely to further a criminal prosecution". (R.17, ¶5; A-12, infra)
5. "The subject summons was not issued at the request of any employee of the Department of Justice (to include any employee of any United States Attorney), nor was it issued at the request of any employee of the United States Customs Service." (R.18, ¶3; A-13 , infra).

The subjective intent of Special Agent Nelson H. Patnaude does not control on the issue of "institutional good faith." It is the subjective intent of the Internal Revenue Service as an institution (Regional Counsel, Assistant Regional Commissioner for Intelligence and Criminal Tax Division of the Office of General Counsel) which is dispositive of the "institutional good faith". LaSalle, supra at 315-316. The above statements of Nelson H. Patnaude in his affidavits are not dispositive of the "institutional good faith" of the IRS and therefore the IRS has not established a prima facie case for the enforcement of the summons herein. An evidentiary hearing with discovery should be ordered in this case to determine the subjective intent of the IRS as an institution.

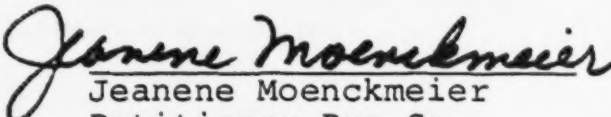
The dissent in LaSalle, supra at 320 expressed a concern that the holding in LaSalle which added "institutional good faith" to the Powell test of good faith would "produce but endless discovery proceedings...." Although the majority knew that their decision in LaSalle would require an expanded need for discovery, this did not deter the majority from adding "institutional good faith" to the Powell test.

The Third Circuit has misinterpreted the meaning of U.S. v. LaSalle, supra in denying petitioner an evidentiary hearing and discovery.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered July 17, 1979.

Respectfully submitted,



Jeanene Moenckmeier
Petitioner Pro Se
1545 Ninth Avenue
San Diego, Calif. 92101
714/239-4887

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September 1979 four copies of the Petition for Writ of Certiorari herein were mailed by me, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.


Jeanene Moenckmeier

(COPY)

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

NO. 79-1472

UNITED STATES OF AMERICA and
NELSON H. PATNAUDE, Special Agent,
Internal Revenue Service.

v.

MIDLANTIC NATIONAL BANK and
BRIAN WAIVER

Jeanene and Ernst O. Moenckmeier,
Intervenors
Jeanene Moenckmeier, Appellant

On Appeal from the United States
District Court for the District of
New Jersey.

C.A. No. 79-0158

Argued July 12, 1979

Before: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions
raised by appellant, it is

ADJUDGED AND ORDERED that the judgment
of the district court be and is hereby
affirmed.

Each side to bear its own costs.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

ATTEST:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: July 17, 1979.

(COPY)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1472

UNITED STATES OF AMERICA, et al.

v.

MIDLANTIC NATIONAL BANK, et al.

Jeanene Moenckmeier, Appellant

(C.A. NO. 79-0158)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT,
ADAMS, GIBBONS, ROSENN, HUNTER, WEIS,
GARTH, and HIGGINBOTHAM, Circuit Judges.

The petition for rehearing filed
by

In the above entitled case having been
submitted to the judges who participated
in the decision of this court and to all
the other available circuit judges of
the circuit in regular active service,
and no judge who concurred in the decision
having asked for rehearing, and a majority
of the circuit judges of the circuit in
regular active service not having voted
for rehearing by the court in banc,
the petition for rehearing is denied.

Dated: By the Court,
August 23, 1979 /s/ Arlin M. Adams
Circuit Judge

ELC:kc
78 4998

(COPY)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : HON. H. CURTIS
and NELSON H. PATNAUDE, : MEANOR
Special Agent, :
Internal Revenue Service, : Civil Action
: No. 79-158
Petitioners, :
v. :
MIDLANTIC NATIONAL BANK, : O R D E R
Respondent. :
: ORIGINAL FILED
: APR 11 1979
Angelo W. Lacascio,
Clerk

This matter having been opened to the Court by Robert J. Del Tufo, United States Attorney for the District of New Jersey and this Court having read and considered the pleadings filed herein and having heard oral argument; and good cause therefor having been shown,

IT IS on this 11 day of April, 1979,

ORDERED

(1) That the respondent appear in person before Nelson H. Patnaude, Special Agent, at 10:00 A.M. on the 20th day of April, 1979 at 970 Broad Street, Room 1404, Newark, New Jersey;

(2) That at the time of the appearance as directed above, respondent testify

and produce all documents, papers, records and information as more fully set forth in the IRS summons which is attached to the Petition; and

(3) That a copy of this Order may be deemed good and sufficient service; and

(4) That intervenor Jeanene Moenckmeier's request for a stay pending appeal is denied.

/s/ H. Curtis Meanor
H. CURTIS MEANOR, JUDGE
UNITED STATES DISTRICT COURT

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1472 April 16, 1979

UNITED STATES OF AMERICA and NELSON H.
PATNAUDE, Special Agent, Internal Revenue
Service

vs.

MIDLANTIC NATIONAL BANK and BRIAN WAIVER

Jeanene Moenckmeier and Ernst O.
Moenckmeier, Intervenor

Jeanene Moenckmeier, intervenor, Appellant
(D.C. Civil No. 79-158)

Present: ADAMS, GIBBONS and WEISS, Circuit
Judges.

1. Appellant's motion for a stay of the
execution of the Internal Revenue Service
summons of June 21, 1978, ordered by
Honorable H. Curtis Meanor, Judge for the
District of New Jersey, to be enforced
on April 20, 1979, pending appeal, and
Exhibits to appellant's motion,

in the above-entitled case,

Respectfully

/s/ T.E. Quinn _ _

enc.
fm

Clerk.

The foregoing Motion is/are granted and
the parties are directed to abide by the
following briefing schedule:

1. Appellant to hand-file and hand-serve
its brief and the appendix not later than
May 2, 1979.

A-6

2. Appellee to hand-file and hand-serve
its brief not later than May 16, 1979,

3. Reply brief, if any, for appellant
is to be hand-filed and hand-served not
later than May 23, 1979.

This case is to be listed for disposition
on the merits during the week of July
9, 1979.

By the Court,

/s/ Arlin M. Adams
Judge

Dated: April 18, 1979.

A-7

(COPY)

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA and)
NELSON H. PATNAUDE, Special Agent)
of the Internal Revenue Service,)
Petitioners,) Civil
v.) Action
MIDLANTIC NATIONAL BANK,) No.
Respondent.)

AFFIDAVIT

STATE OF NEW JERSEY)
COUNTY OF ESSEX)

NELSON H. PATNAUDE, petitioner herein,
being first duly sworn, deposes and says:

1. I am a duly commissioned Special
Agent of the Internal Revenue Service
and I perform my duties under the
District Director of Internal Revenue,
Newark, New Jersey.

2. In my capacity as a Special Agent,
I am conducting an investigation for the
purpose of ascertaining the correct-
ness of the tax returns of Jeanene
Moenckmeier for the taxable years
1975-1976.

3. Pursuant to that investigation
and in accordance with 26 U.S.C. §§7602
and 7603, on June 21, 1978, I served
an Internal Revenue Service Summons,
a copy of which is attached hereto as
Exhibit A, upon the respondent, by

personally handing an attested copy
thereof to Mr. Brian Waiver, Senior
Accountant.

4. The said summons directed the
appearance of the respondent before
an official of the Internal Revenue
Service to give testimony and to produce
books, papers, records, or other data,
as set forth in such summons.

5. The summoned items and testimony
are believed to be relevant to the
investigation, and the information sought
is not already in the possession of the
petitioners.

6. No recommendation for prosecution
of the taxpayer for the years and tax
returns under investigation has been
made to the United States Department
of Justice.

7. A notice of the summons,
together with a copy of the summons, was
sent by certified mail on June 21, 1978,
to:
Jeanene Moenckmeier
1545 Ninth Avenue
San Diego, California 92101

8. Ralph Fucetola III, Esq.,
who represents the taxpayer, gave notice
to the respondent not to comply with the
summons by letter dated June 27, 1978.
A copy of this letter, which is attached
hereto as Exhibit C, was sent to me.

9. Respondent has not to this date
complied with the summons.

10. I make this Affidavit in support
of a petition for judicial enforcement
of the summons.

/s/ Nelson H. Patnaude

Nelson H. Patnaude

Sworn to before me this
19th day of December , 1978.

/s/ Diane M. Peter
Diane M. Peter
Notary Public

My Commission Expires
November 21, 1982.

(Exhibits omitted)

(COPY)

ELC:rpb
79 1298

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, :
and NELSON H. PATNAUDE, : Honorable H.
Special Agent, Internal : Curtis Meanor
Revenue Service, :

: Civil Action
Petitioners, : No. 79-158
:

v.

: SUPPLEMENTAL
MIDLANTIC NATIONAL BANK : AFFIDAVIT
and BRIAN WAIVER, :

Respondents. :

STATE OF NEW JERSEY :
COUNTY OF ESSEX : ss:

NELSON H. PATNAUDE, being duly sworn
according to law deposes and says:

1. I am a Special Agent employed
by the Internal Revenue Service, Criminal
Investigation Division, Newark, New Jersey,
and have been so employed since 1961.

2. I have submitted an Affidavit
in this case and I incorporate the
contents thereof by reference.

3. I have not made a recommendation
for criminal prosecution in this case.

4. The subject summons was not
issued at the request of anyone from the
Office of the United States Attorney.

5. I have not delayed any recommendation at the request of my superiors solely to further a criminal prosecution.

6. Since my involvement with the Criminal Investigation Division's investigation relating to Jeanene Moenckmeier, I have had no knowledge of any wire taps having been used in these investigations.

/s/ Nelson H. Patnaude
NELSON H. PATNAUDE
Special Agent

Sworn and subscribed to
before me this 15th day
of March, 1979

/s/ Angelamaria J. Lowe-Pagliaroli
ANGELAMARIA J. LOWE-PAGLIAROLI
A Notary Public of New Jersey
My Commission Expires June 29, 1980

(COPY)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, : Judge Meanor
and NELSON H. PATNAUDE,
Special Agent, Internal : Civil Action
Revenue Service, : No. 79-158

Petitioners,

v.

MIDLANTIC NATIONAL BANK
and BRIAN WAIVER,

Respondents. :

STATE OF NEW JERSEY:
COUNTY OF ESSEX :ss:

: SUPPLEMENTAL
AFFIDAVIT

: ORIGINAL
FILED
APR 11 1979
Angelo W.
Lacascio, Clerk

NELSON H. PATNAUDE, being duly sworn
according to law deposes and says:

1. I am a Special Agent employed
by the Internal Revenue Service, Criminal
Investigation Division, Newark, New
Jersey and have been so employed since 1961.

2. I have submitted two prior
affidavits in this case and I incorporate
the contents thereof by reference.

3. The subject summons was not
issued at the request of any employee of
the Department of Justice (to include any
employee of any United States Attorney),
nor was it issued at the request of any
employee of the United States Customs
Service.

[cont'd on next page]

(Affidavit continued)

/s/ Nelson H. Patnaude
NELSON H. PATNAUDE

Sworn and subscribed to before
me this 10th day of April, 1979.

/s/ Angelamaria J. Lowe-Pagliaroli
Angelamaria J. Lowe-Pagliaroli
A Notary Public of New Jersey
My Commission expires June 29, 1980.

STATUTES RELIED UPON

(full text)

Title 26, United States Code, Section 7604
Enforcement of summons

(a) Jurisdiction of district court.--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.--Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6424(d) (2), 6427(f) (2) or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with

the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross references.--

(1) Authority to issue orders, processes, and judgments.--

(2) Penalties.--For penalties applicable to violation of section 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(f)(2), or 7602, see section 7210.

Title 26, United States Code, Section 7609
Special procedures for third-party summonses

(a) Notice--

(1) In general.--If--

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(2) Sufficiency of notice.-- Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603. (relating to service of summons) upon the person entitled to notice, or is

mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined.-- For purposes of this subsection, the term "third-party recordkeeper" means--

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney; and

(F) any accountant.

(4) Exceptions.--Paragraph (1) shall not apply to any summons--

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) Nature of summons. Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to stay compliance.--

(1) Intervention.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to stay compliance.--

Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2)--

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(c) Summons to which section applies.--

(1) In general.-- Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 6427(e)(2) and requires the production of records.

(2) Exceptions.-- A summons shall not be treated as described in this subsection if--

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A), or

(B) it is in aid of the collection of
(i) the liability of any person against whom an assessment has been made or judgment rendered, or
(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) Records; certain related testimony.--
For purposes of this section--

(A) the term "records" includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall

be treated as a summons requiring the production of such records.

(d) Restriction of examination of records.

--No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made--

(1) before the expiration of the 14-day period allowed for the notice not to comply under subsection (b)(2), or

(2) when the requirements of subsection (b)(2) have been met, except in accordance with an order issued by a court of competent jurisdiction authorizing examination of such records or with the consent of the person staying compliance.

(e) Suspension of statute of limitations.--if any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(f) Additional requirement in the case of a John Doe summons.--Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that--

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses.

--In the case of any summons described in subsection (c), the provisions of subsection (a)(1) and (b) shall not apply if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production of records.

(h) Jurisdiction of district court.--

(1) The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine proceedings brought under subsections (f) or (g). The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely upon the petition

and supporting affidavits. An order denying the petition shall be deemed a final order which may be appealed.

(2) Except as to cases the court considers of greater importance, a proceeding brought for the enforcement of any summons, or a proceeding under this section, and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date.

Added Pub.L. 94-455, Title XII, §1205(a),
Oct. 4, 1976, 90 Stat. 1699.